No. 138, Original

In the
Supreme Court of the United States

State of South Carolina,

Plaintiff,

v.

State of North Carolina,

Defendant.

Duke Energy Carolinas LLC,
Catawba River Water Supply Project, and
City of Charlotte, N.C.,

Intervenors.

MOTION FOR DIVIDED ARGUMENT
OF DEFENDANT AND INTERVENORS

I. Introduction

Pursuant to this Court's Rules 21 and 28.4, defendant State of North Carolina and intervenors Duke Energy Carolinas, LLC ("Duke"), Catawba River Water Supply Project ("CRWSP") and City of Charlotte, N.C. ("Charlotte") (collectively, "Intervenors") respectfully move for an order granting Intervenors leave to participate in oral argument on Plaintiff's exceptions, if the case is set for oral argument, and to divide

their time for oral argument as follows: ten minutes for Duke, ten minutes for CRWSP and ten minutes for Charlotte. Granting this motion would not require the Court to enlarge the overall time for oral argument on South Carolina's exceptions. Neither North Carolina nor Intervenors have opposed the United States' motion to participate in divided argument in support of South Carolina.

Division of argument time is proper because each intervenor has (a) different interests justifying its intervention and (b) a unique response to South Carolina's contention that Intervenors are adequately represented by the States. Divided argument is appropriate where all parties have substantial interests in the intervention question, *see New Jersey v. New York*, 345 U.S. 369 (1953) (dividing intervention argument five ways), and where, as here, parties have "factually distinct positions." Eugene Gressman et al., Supreme Court Practice 760 (9th ed. 2007) (citing the Court's division of argument time in *Rapanos v. United States*, 126 S. Ct. 617 (2005) and *Clinton v. City of New York*, 523 U.S. 1058 (1998)).

North Carolina — which has endorsed the Special Master's recommendation that the Court grant the three intervention motions as set forth in her First Interim Report — supports Intervenors' proposed division of oral argument time. North Carolina also requests the opportunity to be heard in connection with the motions to intervene. North Carolina, however, recognizes that allowing a four-way division of an oral argument would be extraordinary. Accordingly, if the Court is not inclined to grant a four-way division of oral argument time, North Carolina requests that the Court grant a three-way division of oral argument time between Duke, Charlotte and

CRWSP, with North Carolina standing on its brief. In the event that the Court chooses to limit oral argument to less than three counsel per side, North Carolina remains available to explain at oral argument why it believes that all three motions to intervene should be granted; but North Carolina supports each Intervenor's request to present arguments on its own behalf.

II. The Unique Circumstances of Each Intervenor

A. Charlotte, the largest municipality and water supplier on the Catawba River, is (in her view) the primary target of South Carolina's Complaint. The Complaint focuses on the inter-basin transfer (IBT) of water under the North Carolina IBT statute, and Charlotte is the only entity in North Carolina that is both (a) vested with certificated IBT authority under the statute and (b) actually transferring water from the North Carolina portion of the River. Charlotte's IBT authorization is by far the largest in North Carolina from the Catawba, and South Carolina seeks to enjoin that authority. South Carolina cannot achieve any meaningful reduction in public water use in North Carolina through apportionment without reducing Charlotte's IBTs and consumption.

Charlotte should be heard at oral argument because her motion to intervene uniquely tests the holding of *New Jersey v. New York*, 345 U.S. 369 (1953), in which this Court denied Philadelphia's motion to intervene on the ground that Philadelphia had no compelling interest that could not be adequately represented by Pennsylvania (which opposed the motion). South Carolina contends that Charlotte could be adequately represented here by North Carolina, a view with which North Carolina has

expressed agreement — although North Carolina *supports* Charlotte's motion and the Special Master's recommendation. North Carolina supports Charlotte's motion because, as the Special Master recognized, Charlotte's situation is analogous, not to Philadelphia's (whose motion her home state opposed), but to that of New York City, which was allowed to participate as a party defendant because she was the entity in New York State alleged to be the cause of injury to plaintiff New Jersey. Thus, Charlotte will argue that she should be allowed to intervene whether or not North Carolina might be said to adequately represent her.

The foreseeable interest of the Court in that legal question at oral argument is not undercut by the fact that Charlotte also argues in the alternative that North Carolina does not in fact adequately represent her interests. North Carolina has an undifferentiated responsibility as *parens patriae* for its citizens generally. Charlotte has a much narrower perspective: she only seeks to defend the specific interests of her residents and customers, which are exclusively downstream users. Charlotte's position in this alternative argument is as unique as her primary argument, given that she is located entirely within one of the party states. As a result, her position at oral argument will be distinct from the equally unique positions of both Duke and CRWSP.

B. Duke has eleven impoundments and thirteen hydroelectric facilities within the Catawba River which directly govern the flow and River uses that South Carolina seeks to alter through injunctive relief and equitable apportionment. In a very real sense, Duke is the steward that manages the River. Any injunction or equitable apportionment entered in this case will implicate Duke's vital interests.

Duke conducts its operations on the Catawba River pursuant to a FERC license which is presently the subject of renewal proceedings. As part of the renewal process, Duke brought Catawba River stakeholders together in the Comprehensive Relicensing Agreement (CRA), a contract among water providers and other users of the River which addresses, among other things, Duke's obligations with respect to flow into South Carolina during times of drought. Duke's operations under its current FERC license result in the impounded water that allows the River to flow, especially during drought periods.

Practically, Duke will also be asked to implement, monitor and enforce any remedy ordered in this case. Neither North Carolina nor South Carolina can or will adequately represent Duke's multi-fold interests in the Catawba River. Duke's intervention and South Carolina's opposition to it involve detailed contentions about the nature and extent of Duke's control of the River itself and its property rights, contractual and other relations with those who use or seek to use the River, and withdraw water therefrom – contentions not shared and thus not represented by either party State.

C. CRWSP withdraws water from the Catawba River in South Carolina and supplies it to residents of both North Carolina and South Carolina. CRWSP has a direct stake in this case because South Carolina's Complaint seeks to enjoin an interstate, interbasin transfer of water by CRWSP to Union County, North Carolina. South Carolina is purportedly seeking to eliminate or at least reduce significantly any transfer of water by CRWSP to North Carolina. CRWSP also has a direct stake in any

equitable apportionment decree that could affect flows of water at its intake and the right to withdraw water in South Carolina or deliver now and in the future affordable water to customers in both South and North Carolina.

It is vital for CRWSP to be permitted to address its unique facts which establish that, as a consequence of its unusual bi-state role, neither South Carolina nor North Carolina can represent CRWSP's interests. South Carolina obviously seeks an injunction and equitable apportionment against CRWSP. Similarly, North Carolina has an interest in ensuring that it can make withdrawals from the Catawba River to support the reasonable water needs of its citizens and residents, which according to the Complaint's allegations compete with water use in South Carolina. CRWSP, which serves roughly 100,000 South Carolina residents, therefore can turn to neither North Carolina nor South Carolina to protect its interests. The party States have essentially conceded this.

III. The Impediments to Common Counsel

Prior to filing this motion, Intervenors diligently explored the possibility of representation by common counsel on the intervention question. Although Intervenors have joint and common interests on the claims South Carolina has raised in this Court, they have concluded that their divergent factual circumstances result in potentially conflicting legal positions *with respect to intervention*, and therefore that no single counsel should represent all three of them. The Intervenors may need to compare and contrast their specific factual circumstances which has the potential to create adversity; and efforts to avoid adversity could materially limit the lawyer's ability to

advocate vigorously on behalf of individual intervenors. The best answer to any particular question posed by the Court about the legal standard or factual circumstances warranting intervention may well differ for each Intervenor. Thus, a single counsel's answer would best serve only one of his or her clients.

Further, no single Intervenor's counsel really knows and understands completely the factual circumstances of the other Intervenors as relevant to the legal standard for intervention. In a very short interlude, new counsel would have to master three wholly distinct sets of factual circumstances for three different clients. Moreover, in these times of diminishing tax and other revenues, local governments must be careful stewards of their resources; new joint counsel would be extremely costly.

The Court will be asked to make a *sui generis* decision with respect to each Intervenor (as the Special Master did). Separate participation by each Intervenor will provide the Court with the full understanding of each Intervenor's individual factual interests necessary to decide whether intervention is appropriate.

IV. Precedent for Three-Way Division of Oral Argument

The division of argument time proposed here is strongly supported by a significant ruling on the question of intervention – *New Jersey v. New York*. In that case, this Court divided oral argument on Philadelphia's motion to intervene five ways. The Court granted 20 minutes of argument time to Philadelphia and to each of the four existing parties (New Jersey, New York State, New York City, and Pennsylvania). *See* 344 U.S. 932 (1953) (order); *see also* 345 U.S. at 370 (listing the five attorneys who argued the cause).

The Court has also recognized that in an appropriate case, argument should be divided to permit intervenors to represent their interests in original actions. *See, e.g., Connecticut v. New Hampshire*, 507 U.S. 1016 (1993) (dividing argument and granting intervenors time to participate in oral argument); *South Carolina v. Baker*, 484 U.S. 892 (1987) (same). That is consistent with the Court's general practice of dividing arguments among private parties with inconsistent interests in the litigation.[1] While the foregoing authorities did not involve three parties seeking to present argument, those and other decisions, *see, e.g., Ohio v. Wyandotte Chemicals Corp.*, 400 U.S. 963 (1970) (granting motion to permit three attorneys to participate in oral argument on behalf of defendants in No. 41, Original), illustrate the Court's attention to the unusual circumstances, such as those presented here, that warrant a three-way division of oral argument. *See, e.g., Bush v. Vera*, 516 U.S. 911 (1995) (dividing appellants' oral argument time amongst three parties and extending oral argument by ten minutes for each side); *Pope v. Hunt*, 516 U.S. 962 (1995) (dividing appellees' oral argument time amongst three parties and extending oral argument by ten minutes for each side).

V. Conclusion

In light of the distinct, compelling and conflicting factual interests and legal positions of the three Intervenors, oral presentation of the views of each Intervenor is essential, will be of material assistance to the Court and is well-supported by the decisional law granting divided oral argument under these circumstances.

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1 *See, e.g., Travelers Indem. Co. v. Bailey*, -- S. Ct. --, 2009 WL 578684 (March 9, 2009); *Burlington N. and Santa Fe Ry. Co. v. United States*, 129 S. Ct. 970 (2009); *Pacific Bell Tel. Co. v. Linkline Comm., Inc.*, 129 S. Ct. 617 (2008); *Peake v. Sanders*, 129 S. Ct. 527 (2008); *Clinton v. City of New York*, 523 U.S. 1058

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